attempt to submit to the learned President to impound the exhibit P2 under section 51 and admit it under proviso (a) to section 52(1), if the learned President found that the date of the execution was on November 16, 1973. The case was thus fought on the footing that lack of stamping rendered the document invalid. Let us remind ourselves that it is not so. The exhibit is perfectly valid, but merely becomes inadmissible unless the stamp duty is paid.

When the case came before Mr. Justice Hashim Yeop A. Sani, Mr. Ong Kok Keng repeated his stand in the Sessions Court. He submitted that the date of execution of exhibit P2 was on April 17, 1974 and therefore the document was in order. He made no alternative submission that if the learned judge was not with him the learned judge should use his power under section 51 to impound the exhibit with a view to admitting it in evidence. It is therefore not surprising that the learned judge ruled that the document was not properly stamped and therefore not admissible. It is only before us that Mr. K. Thayalan made this submission that we should impound the document.

The history of this case clearly shows therefore that both parties were at fault with counsel for the appellant sharing a greater part of it. Thus we feel that both parties should bear their own costs here and in the two courts below. Subject to that the appeal is allowed.

The proper order which we should make in this case is that (a) the guarantee exhibit P2 is impounded and (b) the appellant must pay the penalty of $25 to the Registrar who will send the sum together with the exhibit to the Collector of Stamp Duty for stamping, (c) the judgment in the sum prayed should be entered for the appellant (d) both parties are to bear their own respective costs both here and in the two courts below and (e) the stamping of the guarantee exhibit P2 in accordance with section 53 must first be done before the order is drawn.

Order accordingly.

Solicitors: *Yazid Baba & Co.; Dulip Singh & Co.*

YAHAYA BIN MAT & ANOR. v. ABDUL RAHMAN BIN ABU

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) January 4, 1982]

[Penang — Federal Court Civil Appeal No. 246 of 1979]

Practice and Procedure — Appeal — Apportionment of liability — Breach of Highway Code — Evidence misconstrued by trial court.

Road Traffic — Breach of Highway Code — Liability apportioned.

In this case the respondent sustained injuries in an accident when a taxi driven by the first appellant as the servant or agent of the second appellant collided with the bicycle he was riding in Pulau Langkawi. He brought an action for damages against the appellants. The learned trial judge apportioned liability for the accident on the basis of 30% and 70% against the respondent and the appellants respectively and awarded general damages on the basis of 100% liability in the sum of $18,000 being $16,000 for pain and suffering and loss of amenities and $2,000 for loss of future earnings. The appellants appealed to the Federal Court.

Held: (1) in this case the respondent who admitted his vision was blurred because of the heavy rain and by the open umbrella he was carrying in his right hand sideways and that he had no time to avoid the oncoming taxi was clearly in breach of the provisions of rules 56, 59 and 60 of the Highway Code. These are matters which should have been taken into consideration for the purpose of establishing liability under the provisions of section 59(4) of the Road Traffic Ordinance, 1958 but the learned trial judge regrettably held that this by itself did not amount to negligence;

(2) on the evidence as a whole it might well have been that the first appellant in taking the bend went slightly over the centre of the road but this did not necessarily indicate total or preponderant liability as had the respondent not been taking a risk in riding his bicycle in heavy rain and holding an open umbrella in his right hand the first appellant could have avoided the collision even in such circumstances;

(3) in all the circumstances although the first appellant was not entirely free from blame the liability apportioned by the learned judge was not justified on the evidence and the facts of the case and should be varied to two-thirds liability on the part of the respondent and one-third liability on that of the first appellant.

Case referred to:-

(1) *Kosnan* v. *Phua Huat Choy* [1966] 2 M.L.J. 233.

FEDERAL COURT.

P.R. Manecksha for the appellants.

Baldev Singh Bhar for the respondent.

Abdoolcader J. (delivering the judgment of the Court): This appeal involves a claim by the respondent for personal injuries sustained in an accident when a taxi No. AF 2318 driven by the first appellant as the servant or agent of the second appellant on October 25, 1974 collided with the bicycle he was riding in Pulau Langkawi. The respondent was an infant at the material time and when the writ in these proceedings was taken out but has since come of age. It is not necessary to set out the facts of the matter as they appear in the judgment of the learned trial judge who apportioned liability for the accident on the basis of 30% and 70% against the respondent and the appellants respectively and awarded general damages on the basis of 100% liability in the sum of $18,000 being $16,000 for pain and suffering and loss of amenities and $2,000 for loss of future earnings. Special damages had been agreed at $376 and in the result on the basis of this apportionment the respondent was awarded $12,600 as general damages with interest at 6% per annum except in respect of the loss of future earnings and $253 special damages with interest at 3% per annum and costs.

The appellants appealed to this court on the apportionment of liability and assessment of damages and the respondent as a protective measure, we should think, cross-appealed. We upheld the appellants' appeal on the question of liability and held the appellants one-third and the respondent two-thirds to blame, increased the quantum for loss of earning capacity on the basis of 100% liability to $5,000 and in the event awarded the respondent $7,000 as general damages. The appellants' appeal was accordingly allowed with costs to this extent and the cross-appeal by the respondent dismissed with costs. The respondent then applied to this court for conditional leave to appeal against our decision to His Majesty the Yang di-

Pertuan Agong and so did the appellants but counsel for the latter indicated that this was only done as a precautionary measure to protect the interests of the appellants in the event the respondent obtained leave and pursued his appeal. Both applications for leave were refused. The respondent has now applied to the Privy Council for leave to appeal as a pauper and the Judicial Committee has indicated that it requires the judgment of this court for the purposes of considering this application by the respondent. The only question therefore that is material for the purposes of any appeal by the respondent is the question of apportionment of liability for the accident in relation whereto we varied the learned judge's order.

We did so as we were of the view that the learned judge erred in apportioning liability for the accident as he did having regard to his findings that the respondent lost control of the bicycle after negotiating the bend due to heavy rain and strong winds which probably blew the open umbrella he was carrying in his right hand sideways, thus blocking his front view and causing him to proceed more to the centre of the road, that had he controlled his bicycle properly and ridden it nearer to his side of the road instead of near the centre, the accident could have been avoided, he ought to have seen the taxi and heard the warning horn, the fact that he had therefore taken the risk in riding while holding an open umbrella in such bad weather clearly indicated that he did not care for his own safety and that he had sufficient intelligence to have appreciated the danger of riding recklessly in such bad weather on the open road. The respondent who admitted his vision was blurred because of the heavy rain and that he had no time to avoid the oncoming taxi was clearly in breach of the provisions of Rules 56, 59 and 60 of the Highway Code and these are matters which should be taken into consideration and can be relied on for the purpose of establishing liability under the provisions of section 59(4) of the Road Traffic Ordinance, 1958, but the learned judge regrettably held that this by itself did not amount to negligence.

It was also established that the respondent was a right-handed person and was holding the bicycle with his left hand whilst carrying the open umbrella in his right hand and this must necessarily have been a dominant cause of the collision. The learned judge came to the conclusion that the accident took place about 2 feet or so from the centre on the plaintiff's side of the road on the premise that the first appellant had admitted in cross-examination that the taxi had converged to the wrong side by about 2 feet. We found however that there was no evidence of any such admission and the learned judge had in effect misconstrued the evidence of the first appellant when he only said that the respondent cut across about 2 feet or so towards the centre about 4 feet or so from his side of the road and that was when the impact took place.

The learned judge had also rejected the evidence of the respondent and his witness PW1 on certain important aspects such as where the respondent fell, the matter of the bicycle being dragged by the taxi for some 30 feet and the removal of the bicycle by the first appellant and should therefore have scrutinised the rest of their evidence with great care and suspicion, particularly in view of the fact that PW1 admitted that he did not see the actual impact but only heard the sound of a collision and he was in any event walking along a path some 40 feet away from the road. The learned judge also laid great stress on the matter of the broken glass splinters that were found scattered on the first appellant's side of the road but in doing so he was referring to broken glass from the screen. The windshield of the taxi however was not broken but only its off-side headlamp was and this would make some considerable difference to the conclusion he reached on the importance of the position where the glass was found as pieces of glass from the broken headlamp would probably fall almost at the point of impact.

The learned judge moreover appears to have summarily dismissed the evidence of DW2 on the basis that he appeared to have had only a fleeting glance of what happened suddenly but a conclusion of this nature would appear to have more relevance to the evidence of PW1 who admitted he did not see the impact. We also found that there was no reason for suggesting that the evidence adduced by and for the first appellant was wholly inconsistent with the documentary evidence presented but on the evidence as a whole it might well have been that the first appellant in taking the bend went slightly over the centre of the road but this does not necessarily indicate total or preponderant culpability as had the respondent not been taking a risk in riding his bicycle in heavy rain and holding an open umbrella in his right hand the first appellant could have avoided the collision even in such circumstances (*Kosnan* v. *Phua Huat Choy*[1]).

In all the circumstances we found that although the first appellant was not entirely free from blame the liability apportioned by the learned judge was not justified on the evidence and the facts of the case and we accordingly varied it to the extent indicated in the order we made, that is to say, two-thirds liability on the part of the respondent and one-third on that of the first appellant.

Order accordingly.

Solicitors: *Richard Talalla & Co.; Triptipal Singh & Co.*